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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 494

FREIDA MANDEL and SAM MANDEL,

Petitioners,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

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Freida Mandel and Sam Mandel,

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against

The Pennsylvania Railroad Company,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, reversing the judgment of the United States District Court for the Eastern District of New York and remanding the action thereto for a new trial, is reported in 291 F. 2d 433. No opinion was rendered by the United States District Court.

Question Presented

Whether or not certiorari should be granted to review a judgment of the Court of Appeals for the Second Circuit which reversed a judgment of the District Court in favor of the petitioners and remanded the action for a new trial on the ground that the District Court erroneously charged the jury that it may find extraordinary jerking or jolting or swaying of respondent's train of which there was no evidence whatsoever.

Statement of Facts

This common-law negligence action which was commenced in the Supreme Court of the State of New York, County of Kings, was removed to the United States District Court for the Eastern District of New York by reason of diversity of citizenship.

The petitioners, who travelled from New York, N. Y. to Hot Springs, Arkansas during December 5-7, 1957, claimed that on December 6, 1957, the petitioner, Freida Mandel, was caused to fall in the aisle of a railroad car operated by the respondent while it was moving in the vicinity of Port Royal, Pennsylvania.

The evidence of an alleged dangerous condition and notice thereof was sharply conflicting. The evidence pertaining to the manner of the movement of the train was not disputed and is as follows:

Samuel Mandel—Cross:

> (300) "Q. Was the train swaying as you walked back toward the back of the car? A. What?
>
> Q. Swaying? A. Yes." (Appellant's Appendix p. 15a)

Paul E. Westbrook—Direct:

> (337) "Q. Did you ask her how she fell? A. Yes.

Q. What did she say? A. Yes, and she said that the train gave a jerk and caused her to fall." (Appellant's Appendix p. 17a)

(351) "Q. Now, sir, will you describe the movement off the train for us as it was going from Altoona—excuse me, from Harrisburgh to Altoona?"

* * * *

"A. Well, the train makes the usual motion—

Mr. Birnbaum: I object to 'the usual motion', if your Honor please.

The Court: Strike it out.

A. (Continuing) The train makes a motion like anything else on wheels. There is a slight sway one way orr the other. That's about all.

(352) Q. All my questions are directed to this night, caan you describe for us the movement of the train amd swaying of the train as it goes around a curve, thaat is, on December 5, 1957?"

* * * *

"A. In going around the curve, the train will swerve straight in the direction of the curve, and will straighten up after it leaves the curve. it will straighten up again.

The Court: On this particular night, that was tthe sway?

The Witness: Yes.

The Court: No sudden stops or swaying?

The Witness: That is right.

The Court: And you remember that on this night?

The Witness: Yes." (Appellant's Appendix pp. 220a, 21a and 22a).

William W. Dalbey—Direct:

((526) "Q. Could you tell us what the movement of thee train was on the night of December 6, December 7, 11957? A. You mean as to the roughness?

Q. Describe the movement for us? A. I didn't see anything unusual of the train. It wasn't rough, that I noticed.

(527) Q. Could you tell us something about the movement as it corresponds to the way the tracks are laid? A. On a straightaway, it is smooth, the ground curves and the train goes like that (indicating)." (Appellant's Appendix p. 28a)

The Trial Court charged:

(723) "However, if you find that the aisle or passageway to the lavatory was in a dangerous or in an unsafe condition, by reason of the presence of slush or some material, or because it was dark, or because of a combination of both, or if you find that the train was moving along in such a negligent and careless manner, that there was an extraordi- (724) nary jerking or jolting or swaying, and again, I say only if there is such evidence of this, and I leave it to the jury's best recollection to determine that, or if you find that there was a combination that created this passageway as an unsafe or dangerous passageway, and if you found further that the course of the unsafe and dangerous condition, the plaintiff fell, then you must direct your attention to the question of damages." (Appellant's Appendix p. 39a.)

"The same as the swerving or unusual or exaggerated jolting or extraordinary swerving of the railroad. I am not saying that there is such testimony. The Court has pointed out that it has no recollection of it, but if you find that there (734) was an extraordinary swerving, jolting, jerking, then obviously no knowledge of such an act must be shown because the employees of the railroad, themselves performed it." (Appellant's Appendix p. 45a)

The jury rendered a general verdict for the plaintiffs and the defendant appealed from the judgment thereon

on the ground that an issue of which there was no evidence was submitted to the jury. Initially, the Court of Appeals affirmed. The defendant petitioned for rehearing and the plaintiffs pursuant to the direction of the Court of Appeals submitted a Memorandum in Opposition to said petition. On the Petition for Rehearing, the judgment for the plaintiffs was reversed and the action remanded for a new trial.

The Court of Appeals, noting its mistaken belief that a claim for injury due to extraordinary swaying of the train had not been submitted to the jury, stated:

> "[1] It follows that an issue was submitted to the jury on which there was no evidence. This was reversible error, as is attested by myriad cases, e.g., Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 78-79, 27 S. Ct. 412, 51 L. Ed. 708; Erie Railroad Co. v. Gallagher, 2 Cir., 255 F. 814; Schilling v. Delaware & Hudson R. Corp., 2 Cir., 114 F. 2d 69; Thompson v. Peterson, 152 App. Div. 667, 137 N.Y.S. 635." (291 F. 2d 433, 435)

A subsequent Petition for Rehearing by the plaintiffs was denied.

ARGUMENT

The petitioners have not cited any special or important reasons for this Court to exercise its judicial discretion to grant a writ of certiorari.

Although the Court of Appeals in its initial and subsequent opinions stated that there was no evidence whatsoever of extraordinary swaying, the trial judge had no recollection of unusual or exaggerated jolting or extraordinary swaying (Appellant's Appendix pp. 38a, 39a, 45a), there was no evidence thereof according to numerous decisions which the plaintiffs never claimed were inapplicable, and although the petitioners never seriously contended

until the reversal of the judgment that the alleged increased speed was evidence of extraordinary movement (Appellees' Brief, Memorandum in Opposition to Defendant's Petition for Rehearing, Plaintiffs' Petition for Rehearing), the petitioners now seek to avoid a new trial at which the jury may be properly instructed by alleging that the Court of Appeals substituted its view of the facts for that of the jury.

There is no evidence in this action nor do the petitioners claim that there is evidence "that the movement of the car was so unusual and extraordinary as to be beyond a passenger's reasonable anticipation", "that the allegedly unusual movement had an extraordinary disturbing effect upon other passengers", or "of an accident, the manner of the occurrence of which or the effect of which upon the injured person inherently establishes the unusual character of the jolt or jerk" to show extraordinary swaying for which the railroad would be liable. *Taylor* v. *Westchester St. Transit Co., Inc.*, 276 App. Div. 874, 93 N.Y.S. 2d 395 (2d Dept. 1949); *Staller* v. *Phila. Rapid Transit Co.*, 339 Pa. 100, 14 A. 2d 289 (Sup Ct., Pa., 1940). See cases cited at pages 9-13 of Appellant's Brief.

Instead, the plaintiff, Samuel Mandel, testified that the train was only "swaying". The conductor and trainman stated that it made "a motion like anything else on wheels", "a slight swaying one way or the other" and "no sudden stops or swaying". Assuming that the two hour twenty-five minute train trip required two hours fourteen minutes and not the two hours twenty-four minutes, also stated by the conductor (Record, p. 354), there is no testimony that the train did not make shorter intermediate delays or that the increased speed, if any, occurred at Port Royal, Pennsylvania, where the track is perfectly straight (Appellant's Appendix p. 18a). Further, common experience establishes that a train's high rate of speed dictated by the public's desire for rapid transportation does not cause an extraordinarily disturb-

ing effect on passengers or movement beyond a passenger's reasonable anticipation. To hold in this action that the jury may find the railroad liable for the alleged extraordinary swaying of its moving train would be contrary to law and would subject railroads to responsibility for the movement incidental to its form of transportation over which it has no control.

The decision of the Court of Appeals that the Trial Court's charge in this action that the jury may find the railroad negligent because of extraordinary jerking or swaying of the train was reversible error has ample legal support. *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 78-79 (1907). See the cases cited at 291 F. 2d 433, 435 and at page 3 of defendant's Petition for Rehearing. As was argued to the Court of Appeals, to hold otherwise would permit a Trial Court to submit to a jury a theory of liability which is inapplicable to the evidence in the action before it and would impose liability without fault.

The Court of Appeals held that questions of complaints of the condition of the railroad car made by one who never testified are hearsay evidence and, therefore, improper cross examination (291 F. 2d 433, 435). Since such complaints are assertive evidence of the alleged condition the existence of which was denied, it is apparent that the citations set forth in the petition herein at pages 7, 8 are not pertinent and that the petitioners' contention is without merit.

In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500 (1957), this Court stated that writs of certiorari in Federal Employers' Liability Act cases were issued for the following reason:

> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases." (pp. 509, 510)

The case at bar is the ordinary common-law negligence action which as stated by Mr. Justice Brennan lacks the special features granted by federal statute and is significantly different from an action commenced pursuant thereto. It is respectfully submitted, therefore, that the cases relied on by the petitioners (Petition, pp. 5, 6) are inapplicable to this ordinary common-law negligence action.

It is manifest that this petition for a writ of certiorari does not involve either principles the settlement of which is of importance to the public or conflict of opinion and authority between the Courts of Appeal. The issues herein arise out of a common-law negligence action, are of interest only to the particular litigants herein, and will be resolved according to proper instructions at the new trial directed by the Court of Appeals.

Therefore, it is respecfully submitted that the petition be denied. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70 (1955).

CONCLUSION

It is respectfully submitted that there being no basis for the writ, the petition should be denied.

Respectfully submitted,

JAMES S. ROWEN,
Attorney for Respondent.